

February 24, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E07G0039**

JEANNE CONGDON
Code Enforcement Appeal

Location: 18467 Maple Valley Highway

Appellant: **Jeanne Congdon**
2525-43rd Avenue West
Seattle, Washington 98199-3610
Telephone: (206) 283-9940

King County: Department of Development and Environmental Services (DDES)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Dismiss violation nos. 3 and 4; deny appeal with further revised compliance schedule

EXAMINER PROCEEDINGS:

Hearing opened:	September 18, 2008
Hearing closed:	September 18, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 8, 2008, the Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellant Jeanne Congdon and Morteza Shadmand that found code violations on the Congdon and Shadmand properties caused by Mr. Shadmand. The properties are generally located at 18467 Renton-Maple Valley Road SE in the unincorporated area east of Renton south of the Cedar River (the Shadmand property is an inholding lying entirely surrounded by the Congdon property). The Notice and Order cited Ms. Congdon and Mr. Shadmand with four violations of county code, consisting of the following:
 - A. Placement of fill in excess of 100 cubic yards and concrete slabs on steep slopes/wetlands and corresponding buffers, widening the width of an access road over the Congdon property,¹ and clearing and excavation of dirt within a wetland area (west side of the Shadmand residence) on the Shadmand parcel, in violation of permit requirements and critical area regulations.
 - B. Construction of a deck over 30 inches in height on the east side of the Shadmand residence, a bay window in the same general location, and an addition on the west side of the Shadmand residence, without required permits, inspections and approvals.
 - C. Unauthorized placement and occupancy of a substandard dwelling (travel trailer/RV) on the Congdon property in violation of county code.
 - D. Accumulation of assorted rubbish, salvage and debris on both parcels.

The Notice and Order required compliance by certain dates in the spring of 2008 by submittal of a complete clearing and grading application incorporating certain required components; scheduling of an Already Built Construction (ABC) permit pre-application meeting and follow-on submittal of a complete building permit application, with demolition of the non-permitted construction required if the permit is denied; removal of the travel trailer and cessation of occupancy; and removal of rubbish, salvage and debris.

2. Both Mr. Shadmand and Ms. Congdon filed appeals of the subject Notice and Order. The instant Report and Decision addresses the Congdon appeal. (The Shadmand appeal is addressed by a separate concurrent Report and Decision.) The Congdon appeal makes the following claims:
 - A. The violations were all performed by Mr. Shadmand.
3. The roadwork cited in violation no. 1 found by the Notice and Order far exceeds mere maintenance of an access roadway. In part by his own acknowledgment and stipulation in his testimony, and also as shown by a preponderance of the evidence, Mr. Shadmand and persons operating on his behalf have engaged in extensive clearing, grading, and importation of substantial yardage of earth material as well as concrete slab demolition debris in a significant

¹ The Shadmand access roadway in large part traverses an informal access easement over the Congdon property.

rebuilding of the Shadmand access road over the Congdon property.² Mr. Shadmand testified that in such rebuilding, significant drainage reworking was also performed.

4. Appellant Shadmand asserts that the road prism³ was unchanged by his road construction activity, that the road was not altered but merely “repaired” in response to extensive flooding damage during which certain drainage problems were corrected by fill and grading. Mr. Shadmand asserts that all of the roadwork was conducted to protect and indeed to “save” the road, and was merely “maintenance,” similar to activity Mr. Shadmand testified he has conducted approximately every other year for the last two decades. That the work was performed to repair and protect the road indeed seems to be true, perhaps with the best of intentions. However, that does not preempt grading permit requirements. It is common that repair of naturally caused (and human-caused, for that matter) damage must be performed under the auspices of a permit, and that is the case here. Again, the roadwork conducted by the Appellant and his contractor was not mere upkeep, but significant rebuilding and repair work involving extensive grading and fill, all conducted within defined critical areas. That type of work must be conducted under the auspices of a grading permit.
5. DDES stipulated that the fill and excavation work may not involve fill in excess of 100 cubic yards, a point which Mr. Shadmand contested in his appeal.
6. All of the Congdon and Shadmand properties are designated as geologically sensitive areas, with respect to erosion hazard and landslide hazard and, in the far northeast corner, seismic hazard as well. The entirety of both properties is thus a critical area as defined by county code. (No evidence of their formal designation or other qualification as steep slope hazard areas is presented.)
7. There are no grading permit exceptions in landslide hazard critical areas and buffers (nor is there any for steep slope hazard areas). Therefore, any amount of fill placed on the Shadman and Congdon properties is subject to the requirement of a grading permit. [KCC 16.82.050 and .051]
8. In support of its finding of violation in the Notice and Order that the placement of fill occurred in “wetlands and corresponding buffers,” DDES offers a critical area ordinance (CAO) hydrologic sensitive areas map (exhibit 6, graphic no. 8) which depicts no location of critical areas on the Congdon property, but depicts an “area of potential wetland influence” in the area. However, the designation of “area of potential wetland influence” has no regulatory effect under King County Code. The terms “area of potential wetland influence”; “potential wetland influence”; and “wetland influence” are not terms that are defined in the county zoning code, the title within which the critical area regulations are set forth, Title 21 KCC. [KCC Chapter 21A.06] Neither is any of those terms set forth as delineated “critical areas” in the definition of “critical area” in KCC 21A.06.254. Lastly, the terms are not utilized in any regulatory fashion, if at all, in the critical area chapter (Chapter 21A.24 KCC) within the zoning code.⁴

² Appellant Shadmand and his contractor acknowledged that 9-10 cubic yards of fill were placed “on the upper side of the road...to divert water” and that two dumploads of ballast were placed on the road surface. It is also evident from the record that new fill was placed on road sideslopes.

³ The dimensional cross-section.

⁴ It appears that the seemingly generalized mapping and use of the term “area of potential wetland influence” is a review-triggering screening mechanism employed by the county executive branch. Such a review mechanism does not have any regulatory effect in and of itself, and certainly has no effect of assigning definitive critical area status to any land area and/or parcel so designated in the “CAO hydrologic sensitive areas” mapping system of the county.

9. The Notice and Order violation no. 1 finding of placement by the subject roadwork of fill within critical areas is shown by a preponderance of the evidence to be correct and is sustained (though the evident critical areas are of landslide hazard and erosion hazard). The width of the access road was also increased, by adding to fill slopes. It has not been shown by the evidence presented that the roadwork occurred in steep slope hazard areas or wetlands and corresponding buffers, and those aspects are not sustained.
10. DDES noted that a pre-application meeting was held between Appellant Shadmand and DDES for the subject grading work, but no grading permit application was submitted. Mr. Shadmand requests that there not be a requirement of geotechnical review for the work, asserting that none was required for similar activity in a prior code enforcement case. DDES noted that there may be some alternatives available regarding geotechnical review. The review requirements and procedures associated with permit obtainment are not directly under hearing examiner jurisdiction, but are under DDES's administrative authority; Mr. Shadman's concerns should be addressed to DDES.
11. DDES stipulated that cited violation nos. 3 and 4 regarding unauthorized placement and occupancy of a substandard dwelling (a travel trailer/RV) and the accumulation of assorted rubbish, salvage and debris have been resolved. With such stipulation, those violations will be dismissed.
12. Violation no. 2 of the Notice and Order does not pertain to the Congdon property or to any activity conducted by Ms. Congdon.
13. Mr. Shadmand is shown to be the perpetrator of the violations in this case. Therefore, Ms. Congdon as a non-perpetrator is not subject to fines and penalties for the violations, pursuant to KCC 23.02.130.B. Nevertheless, as the property owner, Ms. Congdon is ultimately responsible for her property being brought into compliance with respect to the subject violations. (DDES noted that in order for Mr. Shadmand to be able to be able to pull permits for corrective activities on the Congdon property, Ms. Congdon will have to authorize his application.)

CONCLUSIONS:

1. As found above, the charge of violation no. 1 in the Notice and Order is shown to be correct in large part, and is therefore sustained. The roadwork that was performed is required to be conducted under a grading permit, and no grading permit was obtained. The compliance schedule below shall require the obtainment of the necessary permit. (The Notice and Order compliance schedule is adjusted to reflect the time taken up by the appeal process.)
2. As noted above, violation no. 2 in the Notice and Order does not pertain to Ms. Congdon, but only to Mr. Shadmand.
3. Violation nos. 3 and 4 in the Notice and Order are stipulated by DDES to be resolved, and they shall be dismissed.
4. The sustained violations are primarily the responsibility of Mr. Shadmand, as they occurred as a result of his own personal action and/or by his direction. Ms. Congdon, found not to be the actual perpetrator of the violations, is not subject to fines and penalties for these violations, as noted above; however, as the ultimately responsible owner of her property, she is ultimately liable for correction of the violations on her property, and absent correction, liable to abatement by the County.

5. In summary, the appeal shall be denied, except that violations no. 3 and 4 are to be dismissed, and the violations found regarding wetland impact are not sustained.

DECISION:

Given the stipulation of their having been resolved, found violation nos. 3 and 4 of the Notice and Order are dismissed summarily. Violation no. 2 does not pertain to Ms. Congdon. With respect to violation no. 1, the appeal is denied except with respect to the alleged wetland violations, and the Notice and Order is otherwise sustained, provided that the compliance schedule pertinent to Ms. Congdon's ultimate responsibilities is revised as stated in the following order.

ORDER:

1. Submit a complete clearing/grading application to DDES *by no later than April 27, 2009* as per the permit requirements specified at the pre-application meeting held under file A07P0107. The Appellant should note that geotechnical and wetland reports are indicated by DDES as required components of the application. (It should be noted that though a violation of wetland critical area regulations has not been proven in the instant case and the Notice and Order not sustained in such regard, that does not preclude DDES from acting under its administrative permit review authority to utilize whatever screening mechanisms are established for critical area review in permit processing. That administrative function is not under the Examiner's authority in the instant case.) After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellant through to permit issuance and obtainment and final inspection approval.
2. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES' sole judgment, by circumstances beyond the Appellant's diligent effort and control. DDES is also authorized to grant extensions of finalization of the clearing and grading work for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).
3. No fines or penalties shall be assessed by DDES against Ms. Congdon. However, if the above compliance requirements and deadlines are not complied with in full, DDES may resort to abatement proceedings on its own initiative, with costs chargeable to the respective properties.

ORDERED February 24, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE MAY 6, 2008 MOTION HEARING AND SEPTEMBER 18, 2009 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E07G0039

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin representing the Department; Morteza Shadmand, Appellant; Jeanne Congdon, Appellant; and James Tasca.

The following exhibits were offered and entered into the record on May 6, 2008:

Exhibit No. 1	Motion to Dismiss dated April 4, 2008
Exhibit No. 2	Copy of the Notice & Order issued February 8, 2008
Exhibit No. 3	Copy of the Notice and Statement of Appeal received February 29, 2008
Exhibit No. 4	Appeal of Jeanne Congdon received February 19, 2008

The following exhibits were offered and entered into the record on September 18, 2009

Exhibit No. 5	Codes cited in the Notice and Order
Exhibit No. 6	Photographs of subject properties dated January 25, 2007
Exhibit No. 7	Violation letter to Mr. Shadmand from Holly Sawin dated February 14, 2007
Exhibit No. 8	Photographs of subject property dated January 9, 2008
Exhibit No. 9	Aerial photos of subject property and King County Department of Assessments photographs of subject residence
Exhibit No. 10	DDES staff report
Exhibit No. 11	Photographs of subject property dated September 16, 2008
Exhibit No. 12	Road site plan

PTD:vsm
E07G0039 RPT2